BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA LUEVANO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,150
NEX TECH AEROSPACE	)	
Respondent	)	
AND	)	
	)	
LM INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 15, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to have suffered a compensable work-related injury on or about March 4, 2010. As a result, claimant was awarded authorized psychological care and treatment with Howard Brodsky, Ph.D. Claimant was also awarded temporary partial disability (TPD) beginning May 7, 2010, and continuing until claimant was released to substantial and gainful employment and temporary total disability (TTD) if taken off work by the authorized treating physician.

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Daniel S. Bell of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held May 25, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury on or about March 4, 2010, resulting in psychological injury and/or post-traumatic stress disorder (PTSD), that arose out of and in the course of her employment with respondent? Respondent acknowledges

that claimant suffered injuries to her upper extremities on the date alleged. However, respondent contests claimant's allegations of an aggravation of her preexisting psychological problems from this accident. Claimant contends the evidence in this record supports her allegations of an injury-related aggravation of her psychological condition.

2. Did claimant's notice of hearing filed pursuant to K.S.A. 44-534a(a)(1) satisfy the requirements of the statute? Respondent argues that claimant's notice of hearing fails to mention the allegations of a psychological injury or PTSD. Additionally, no medical or psychological documentation was attached to the application for hearing filed in preparation for this preliminary hearing.

3. Did the ALJ exceed her jurisdiction in granting claimant's request for relief at the preliminary hearing, including the request for authorized psychological care, appointing Dr. Brodsky as the authorized treating psychologist and ordering payment of TPD beginning May 7, 2010?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be set aside with regard to the Order granting claimant authorized treatment with Dr. Brodsky for her psychological complaints.

Claimant had been working for respondent as a masker for about two years. This job required that she mask and plug certain parts of items designated for painting or chemical spraying. The masking and plugging prevented paint and chemicals from getting into parts of the items not intended to be painted or sprayed.

On or about March 4, 2010, claimant experienced pain, weakness and numbness in her hands while masking and plugging an item for respondent. Claimant reported the symptoms to respondent and was referred by respondent to Travis D. Hubin, D.O., for an examination on March 9, 2010. Claimant was diagnosed with bilateral wrist tendinitis, and Dr. Hubin restricted her from repetitive motion with her hands and instructed her to continue wearing wrist splints which claimant had obtained prior to the examination. Claimant returned to Dr. Hubin on March 16, 2010, and was diagnosed with the same condition. After that examination, claimant was restricted from using her hands entirely. On March 30, 2010, claimant's restrictions were modified to limit the use of her hands to no greater than 2 hours per day. Respondent returned claimant to work performing light duty 2 hours per day, 5 days per week. As of the preliminary hearing, claimant continued working the 2 hours per day, 5 days per week schedule.

Claimant served written claim on respondent by letter of March 22, 2010, which was received by respondent's insurance agent on March 26, 2010. The written claim specified that claimant had not suffered these types of injuries nor been involved in this type of claim before. The Notice of Intent, requesting TTD and/or TPD and authorized medical treatment with an orthopedic or physical medicine specialist, was filed on April 1, 2010. Claimant's K-WC E-1, Application for Hearing, claiming an injury on March 4, 2010, to claimant's bilateral upper extremities and all exacerbations thereto, was filed on April 1, 2010. Claimant's K-WC E-3, Application for Preliminary Hearing, was also filed on April 1, 2010. An agreed Order signed by the parties and the ALJ was filed on April 21, 2010. The Order required respondent to submit a list of three qualified Wichita upper extremity physicians from which claimant was to choose the authorized physician for her bilateral upper extremity injuries. All other issues, including a request for TTD and/or TPD, were reserved for future hearings.

A second Notice of Intent, requesting TTD and/or TPD and medical treatment with a Wichita psychologist for PTSD-type symptoms, was filed on May 10, 2010. A K-WC E-3, Application for Preliminary Hearing, was also filed on May 10, 2010, along with an Amended Notice of Preliminary Hearing filed on that same date, scheduling a preliminary hearing for May 25, 2010. There were no medical attachments to the Notice of Intent. A preliminary hearing was held on May 25, 2010, with the decision of the ALJ that is the subject of this appeal being issued on June 15, 2010. At the preliminary hearing, counsel for respondent alleged the preliminary hearing was premature due to the timing of the seven-day notice and application for preliminary hearing. Respondent argues in its brief to the Board that claimant is in violation of K.S.A. 44-534a(a)(1).

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534a(a)(1) states:

> (a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to

> produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

The above statute is specific with regard to the procedural requirements leading up to a preliminary hearing. The written notice must be specific as to the benefit being requested. The original Notice of Intent (filed April 1, 2010) requested medical treatment from either an orthopedic specialist or from a physical medicine specialist for the alleged injuries to claimant's upper extremities. The psychological aspect of this claim did not arise until the second Notice of Intent was filed on May 10, 2010, the same day as the filing of the K-WC E-3. There was no seven-day time period between the filing of the Notice of Intent and the K-WC E-3.

> The fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.[1]

> [T]he legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed in the statutory language.[2]

The Kansas Supreme Court, in a recent decision, held that when a workers compensation statute is plain and unambiguous, effect must be given to the express language of the statute.[3] Here, K.S.A. 44-534a(a)(1) establishes specific procedures that must be followed before a preliminary hearing may be held. In this instance, claimant failed to follow those procedures. Therefore, the ALJ was without jurisdiction to hear and determine the matter before her. The Order of the ALJ issued on June 15, 2010, is set aside.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[1] *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

[2] *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008).

[3] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 607-608, 214 P.3d 676 (2009).

[4] K.S.A. 44-534a.

CONCLUSIONS

The procedural requirements of K.S.A. 44-534a(a)(1) were not followed by claimant. Therefore, the ALJ was without jurisdiction to hear or decide this matter.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 15, 2010, should be, and is hereby, set aside.

IT IS SO ORDERED.

Dated this ____ day of September, 2010.

HONORABLE GARY M. KORTE

c: Dennis L. Phelps, Attorney for Claimant
Daniel S. Bell, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge